SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1417

HUMANE SOCIETY OF AUSTIN AND TRAVIS COUNTY,

Petitioner

v.

THE AUSTIN NATIONAL BANK, EXECUTOR OF THE ESTATE OF MARY MAYFIELD GUTSCH, DECEASED, *et al*,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

April 6, 1976

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SUBJECT INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING WRIT 4

CONCLUSION 11

CERTIFICATE OF SERVICE 12

APPENDIX A 13
Supreme Court of Texas Opinion

APPENDIX B 25
Federal Statutes and Regulations

APPENDIX C 27
Probate Court Order

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To the Honorable, the Chief Justice and Associates Justices of the Supreme Court of the United States:

THE HUMANE SOCIETY OF AUSTIN AND TRAVIS COUNTY, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Texas entered in the above-entitled case on January 7, 1976.

OPINIONS BELOW

The opinion of the Texas Supreme Court is reported at 531 Southwestern Reporter 2nd Series 574 and is printed in Appendix A hereto, infra, page 13.

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JURISDICTION

The judgment of the Supreme Court of Texas (Appendix A, infra, page) was entered on December 10th, 1975. A timely petition for hearing was denied on January 7th, 1976. The jurisdiction of the Supreme Court is invoked pursuant to 28 USC Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether the Federal Statutes, Regulations and cases prohibiting self-dealing apply to a National Bank-Executor.

2. Whether such Federal Statutes, Regulations and cases prohibiting self-dealing can be circumvented by a strained application of the "awaiting investment" exception.

3. Whether funds held by a National Bank-Executor under direct orders of the Probate Court to invest them can be "funds awaiting investment" for a period of sixteen months.

STATUTE INVOLVED

This case involves Section 9.12 of 12 Code of Federal Regulations entitled Self-Dealing, which provides as follows:

> "Unless lawfully authorized by the instrument creating the relationship, or by court order or by local law, funds held by a national bank as fiduciary shall not be invested in stock or obligations of, or property acquired from the bank or its directors, officers, or employees, or individuals with whom there exists such a connection, or organizations in which there exists such an interest, as might affect the exercise of the best judgment of the bank in acquiring the property, or in stock or obligations of, or property acquired from, affiliates of the bank or their directors, officers, or employees."

STATEMENT OF THE CASE

This is a case in which the HUMANE SOCIETY OF AUSTIN AND TRAVIS COUNTY, as residuary beneficiary of the Mary Mayfield Gutsch Estate, sought to avoid or offset executor and attorney fees charged by the AUSTIN NATIONAL

BANK while acting the role of executor for the Gutsch Estate on the basis that a fiduciary should not be allowed to profit out of his trust. The respondent bank used money held in its fiduciary capacity of executor and loaned it to itself in the form of purchasing its own certificates of deposit bearing lower interest rates than those of other financial institutions in the area.

In the Court of Civil Appeals and the Supreme Court of Texas, the Respondent successfully argued the proposition that such an action was permissible under 12 USCA Sec. 92a which in part states "Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Comptroller of the Currency." Alsa relied upon was Section 9.10 of 12 Code of Federal Regulations which states in part "Funds held in a fiduciary capacity by a national bank awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account" and "funds held in trust by a national bank, including managing agency accounts, awaiting investments or distribution may, unless prohibited by the instrument creating the trust or by local law, be deposited in the commercial or savings or other department of the bank, provided that it shall first set aside under control of the trust department as collateral security . . ."

The Supreme Court of Texas after quoting with approval the following excerpt from *Magruder v. Drury*, 235 US 106 (1914) at page 119:

> "It is a well-settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interests to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity."

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then ruled that the Respondents investing its own certificates of deposit bearing lower interest rates was not an investment but was simply a deposit awaiting investment or distribution. This was in error because the Probate Court had ordered the Executor to invest the funds and distribution did not occur until more than sixteen months after the Respondent's first purchase of its own Certificates of Deposit.

In its Motion for Rehearing the Petitioner urged the Supreme Court of Texas to reconsider its decision. The Petitioner argued that 12 C.F.R. Sec. 1.12 prohibits any self-dealing and specifically prohibits a national bank acting in a position of trust, from investing funds held, in stock or obligations of itself. The Petitioner also urged the Court to accept its theory that monies held as certificates of deposits are invested, that certificates of deposit are investments and obligations of the bank and are not simply deposits.

The Motion for Rehearing was denied and the Supreme Court of Texas reaffirmed its decision concluding that the bank's purchase with estate funds of its own obligations, certificates of deposit, was permissible within the meaning of 12 USCA Sec. 92a since the funds were "awaiting investment" and that the bank was authorized to invest the funds in its own certificates of deposit pending final determination of their proper dispersal. The opinion appears in Appendix A of the Petition.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Texas has ruled contrary to the Federal law, i.e., Section 9.12 of 12 Code of Federal Regulations entitled "Self-Dealing," and contrary to the United States Supreme Court Case of *Magruder v. Drury*, 235 US 106 (1914).

The Supreme Court of Texas has misconstrued the Federal statutes, Regulations and cases in order to allow a national bank acting as executor of an estate to self-deal by purchasing its own obligations. The opinion attached to this Petition allows a national bank-executor to borrow money from itself at

rates determined by itself. The bank-executor acting as lender is permitted to loan funds to itself as bank-borrower under the justification that the funds are awaiting investment or distribution.

If the opinion of the Supreme Court of Texas is allowed to stand, the well established rule prohibiting a fiduciary from profiting in any way through using funds held in its fiduciary capacity will be significantly diluted.

Facts

The Estate was being administered by the Executor-Bank under direct supervision of the Probate Court. A will construction suit was filed which the Executor-Bank, and the Probate Court knew it would require approximately two years to complete.

When received by the Executor-Bank, the Estate contained large holdings of inadequately productive stocks. On application of Petitioner, the Probate Court ordered the Executor-Bank to sell the stocks and *ordered* it to *invest* the *proceeds* ($883,000.00) in any one of several conservative investments, "certificates of deposits in banks and savings and loan institutions; day-in, day-out savings accounts; commercial paper in prime-rated corporations; U.S. Treasury bills, bonds or notes due within two years; and U.S. agency securities due within two years." A copy of the Probate Court's order is printed in Appendix A.

Notwithstanding such Probate Court order and the Federal Statutes, Regulations and cases prohibiting self-dealing, and over the protest of Petitioner that better and higher interest rates were available, the Executor-Bank invested the entire cash funds by purchasing its own certificates of deposit, and continued to do so until distribution some sixteen months later.

Funds Were Not "Awaiting Investment or Distribution"

The attempted justifications of "awaiting investment" or "awaiting distribution" does not fit the facts of this case.

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All funds held by an executor are literally "awaiting distribution." If the statutes and regulations allowing banks to deposit funds had intended that broad definition, it would simply have said "all funds" of the estate may be deposited in the executor-bank. Obviously the statutes and regulations intended something less than "all funds," and the only reasonable interpretation is funds awaiting *immediate* distribution.

In this case, a will construction suit was in progress, all parties knew it would be a long period of time before distribution could be made, and it was in fact over sixteen months before distribution was in fact made.

"Awaiting investment" likewise does not fit this case. The "awaiting investment" provision of the statutes and regulations should most reasonably be interpreted to allow the bank to deposit funds in its commercial bank for short periods until suitable investments can be made.

But in this case, the Probate Court had *ordered* the Executor-Bank to *invest* the funds in any of the five investments mentioned, including certificates of deposit, but not of the Executor-Bank. In fact, the very purpose of the Probate Court order was to sell the inadequately yielding investments (stocks) and to *re-invest* the proceeds in order to obtain a higher yield.

To hold that this $883,000.00, which the Probate Court had ordered invested, was a deposit, "awaiting investment" for a period of sixteen months, not only strains any reasonable interpretation of the regulations, but is in direct opposition to Section 9.10 of 12 Code of Federal Regulations which states in part: "Funds held in a fiduciary capacity by a national bank awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account."

It is hard to understand how the Texas Court can cite *Slay v. Burnett Trust*, 187 SW2d 377 (1945), quote from *Magruder v. Drury*, 235 US 106 (1914), and then apparently approve a self-dealing situation.

The Court correctly held in part as follows:

> ". . . the executor of an estate is held to the same fiduciary standards in his administration of the estate as a trustee . . . As a trustee of the property of the estate, the executor is subject to the high fiduciary standards applicable to all trustees."

Thereafter the Court quotes from the *Magruder* case, *supra*, and the principle embodied in the United States Supreme Court case at 235 US 120 cannot be emphasized too strongly:

> "It is a well-settled rule that a trustee can make no profit out of his trust. The rule springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity."

In the very next sentence following the *Magruder* quote, *supra*, the Texas Supreme Court states (page 4 of the opinion):

> "By purchasing its own certificates of deposit with funds of the Gutsch Estate which it held in trust as executor, the Bank in effect borrowed the funds for its own use."

The Court said the bank is entitled to use this money and profit thereby because the federal and state banking laws permit such acts so long as the funds are "awaiting investment."

The Court relied on the regulation interpreting "awaiting investment" issued by the Comptroller of the Currency at 12 C.F.R. Sec. 9.10, pursuant to 12 USCA Sec. 92a. But that regulation specifically says the funds may be used by a national bank "unless prohibited by . . . local law . . ."

The common law in the State of Texas has time and again prohibited a trustee from using trust funds in his business to

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derive a profit therefrom. No distinction has previously been made on the basis that the funds were fully secured from loss. No distinction has previously been made because the trustee was a bank and "was not, we believe, (acting) in furtherance of its own self-interest." (Opinion, page 10)

Whether or not the bank was acting "in furtherance of its own self-interest" or whether or not it acted in good faith are not issues in this case. The heretofore strictly enforced rule against self-dealing is to eliminate the possibility of self-interest or bad faith by a fudiciary. *Margruder v. Drury, supra.*

The purchase by a bank-executor of its own certificate of deposit is specifically prohibited by Texas statutes. Article 7425b-14, V.A.T.S., provides in part:

> "A corporate trustee shall not purchase for a trust shares of its own stocks or its bonds, obligations, or other securities . . ."

Article 7425b-12, V.A.T.S., provides in part:

> "A trustee shall not buy or sell, either directly or indirectly, any property owned by or belonging to the trust estate, from or to itself or an affiliate . . ."

Section 352 of the Probate Code, V.A.T.S., provides in part:

> "The personal representative of an estate shall not become the purchaser, directly or indirectly, of any property of the estate sold by him, or by any co-representative if one be acting."

These statutes absolutely prohibit the purchase by the bank-executor of its own certificates of deposit. Federal regulations also prohibit funds held by a fiduciary from being invested in itself or its obligations. 12 C.F.R. Sec. 9.12.

Sec. 9.12 Self-Dealing

(a) "Unless lawfully authorized by the instrument creating the relationship, or by court order or by local law, funds held by a national bank as fiduciary shall not be in-

vested in stock or obligations of, or property acquired from the bank or its directors, officers, or employees, or individuals with whom there exists such a connection, or organizations in which there exists such an interest, as might affect the exercise of the best judgment of the bank in acquiring the property, or in stock or obligations of, or property acquired from, affiliates of the bank or their directors, officers, or employees."

The Supreme Court of Texas through its interpretation of Section 9.12 along with Sections 9.10 or 12 Code of Federal Regulations and Section 92a of 12 USCA whittles at the general rule with the "awaiting investment" exception. The Texas opinion would permit a national bank-executor to invest trust funds or estate funds in its own obligations under the justification that the funds are "awaiting investment or distribution" and that the funds "should not be held uninvested or undistributed" for an unreasonable period of time.

The Petitioner would urge that a more proper interpretation of the statutes and regulations would prohibit the fiduciary from investment of funds in itself at any time, but would permit the "deposit" of the funds in itself if secured by United States bonds or other securities approved by the Comptroller of the Currency. Even in such instance, the deposit would be only for short periods of time if in fact the funds are awaiting investment or awaiting distribution.

A distinction should be made between funds invested in a fiduciary's own obligations and funds simply deposited or held by the fiduciary. Investing funds in a fiduciary's own obligations is self-dealing and specifically prohibited by Section 9.12 of 12 C.F.R. whereas funds deposited in or held by the fiduciary are permitted so long as the funds in actuality are awaiting investment or distribution.

In this case the funds were invested in the fiduciary's own obligations which constitutes self-dealing. The Respondent further strains credulity by proposing that certificates of deposit were not investments or obligations but were simply deposits and thus qualify for the exception.

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The Supreme Court of Texas improperly interpreted the application of the Federal statutes and regulations in its holding on pages 7 and 8 of its decision that, since these were funds "awaiting investment," the bank was thereby authorized to invest the funds in its own certificates of deposit pending final determination of their proper dispersal. Nowhere in any of the Federal Statutes or regulations is a fiduciary permitted to invest in itself or its own obligations.

In *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1 (1928) Justice Cardoza expressed the strict legal prohibitions against self-dealing by a fiduciary:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctillio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. • • • Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

In *Johnson v. Peckham*, 132 Tex. 148, 120 SW2d 786, 120 A.L.R. 720 (1938), the late Justice Hickman speaking for our Supreme Court quoted approvingly from Justice Cardozo's *Meinhard* opinion and pronounced the rule governing fiduciary relationships in this State:

> "When persons enter into fiduciary relations each consents, as a matter of law, to have his conduct towards the other measured by the standards of the finer loyalties exacted by courts of equity. That is a sound rule and *should not be whittled down by exceptions.*"

In Bogert, *Trusts and Trustees*, 2d Ed Sec. 543(j), p. 548, it is stated:

"The trustee may violate the duty of loyalty by *lending trust funds to himself*. He thus brings into play a conflict of private and representative interests. As lender it is his duty to get the best terms possible as to interest, security, and maturity. As debtor his impulse is naturally in the direction of getting the money at the lowest rate and often on other terms not advantageous to the lender."

The prohibition against self-dealing by a fiduciary, heretofore one of the most revered rules of our American jurisprudence, should not under any circumstances be "whittled down" by exceptions such as have been approved by the Texas Supreme Court in this case. We urge this Court to enforce the prohibition against self-dealing and to deny profit to anyone in violation thereof.

CONCLUSION

For the foregoing reasons Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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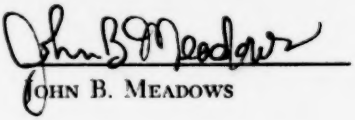
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been mailed, certified mail, to Mr. James P. Hart and Mr. James H. Keahey, 904 Brown Building, Austin, Texas, attorneys for respondent, this 6th day of April, 1976.



JOHN B. MEADOWS

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APPENDIX A

OPINION BELOW

IN THE SUPREME COURT OF TEXAS

No. B-5044

HUMANE SOCIETY OF AUSTIN AND TRAVIS COUNTY, Petitioner	I	
v.	I	From Travis County
THE AUSTIN NATIONAL BANK, EXECUTOR OF THE ESTATE OF MARY MAYFIELD GUTSCH, DECEASED ET AL, Respondent	I	Ninth District

This is a case in which petitioner, the Humane Society of Austin and Travis County, is challenging commissions and attorneys' fees claimed by Austin National Bank as dependent executor of the estate of Mary Mayfield Gutsch, deceased. The probate court allowed the claims as submitted and disallowed all offsets claimed by the Humane Society, and the Court of Civil Appeals affirmed. 517 S.W.2d 323.

By its first three points of error the Humane Society contends that the Bank was guilty of self-dealing in investing the estate's funds in its own certificates of deposit pending distribution of those funds. In points four and five the Humane Society contends that the Bank incurred unnecessary expenses for maintenance and storage of property in the estate. In point six the Humane Society contends that the Bank is not entitled to claim attorneys' fees incurred in a prior suit seeking a construction of decedent's will because the work performed by the attorneys was of no benefit to the estate. We overrule all points of error and affirm the judgment of the Court of Civil Appeals.

Mary Mayfield Gutsch died on October 19, 1971, in Travis County, Texas, leaving a holographic will in which Austin

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National Bank was named executor. The will was probated in Travis County on November 1, 1971, and the Bank qualified as dependent executor. The Bank instituted suit seeking a declaratory judgment to determine the rights of the named beneficiaries under the will. The outcome of that suit was finally determined by this Court in our decision of December 13, 1973, City of Austin v. Austin National Bank, 503 S.W.2d 759. As it was finally construed, the will devised to a god-child all tangible personal property found in Mrs. Gutsch's house at her death; the house and the land upon which it was located was devised to the City of Austin to be used as a public park; and the remainder of the estate (approximately two-thirds) was devised to the Humane Society in fee.

On September 11, 1972, the Bank made an application to the probate court, joined by the Humane Society, to sell certain bank and other stock of the estate and re-invest the funds in other securities yielding a better return, pending the outcome of the will construction suit. On September 15, 1972, the probate court entered an order authorizing such sale and listing the types of securities in which the Bank could re-invest the proceeds, including certificates of deposit in banks and savings and loan institutions. Pursuant to this order the Bank sold the estate's stock and, in September and November of 1972, purchased certificates of deposit from its own commercial department with the proceeds. These certificates, in the total amount of $883,000.00, were renewed from time to time over the succeeding sixteen months.

The Humane Society contends that under the common law of trusts and the provisions of the Texas Trust Act, the Texas Banking Code, and the regulations of the Federal Comptroller

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of Currency, the Bank was absolutely prohibited from investing funds of the estate with itself. For this alleged breach of the Bank's fiduciary duty the Humane Society seeks to deny the bank its commission as executor and to recover any profits made by the bank from use of the money invested in the certificates of deposit.

First, it is clear that the Texas Trust Act, TEX. REV. CIV. STAT. ANN. articles 7425b-1 through 7425b-47, is not applicable here. Article 7425b-2 states that a "trust" for purposes of the Act "means an express trust only, . . ." In City of Austin v. Austin National Bank, supra, we held that Mrs. Gutsch's will did not create a perpetual charitable trust, but vested the residuary estate in the Humane Society in fee. Even though the estate's funds were held by the Bank in a fiduciary capacity for the benefit of the Humane Society as beneficiary of the estate, the duties of the Bank arose by reason of its position as executor of the estate, not as trustee of any express trust created by the will. An express devise of property to another as trustee for named beneficiaries is required for creation of an express trust. Fitz-Gerald v. Hall, 150 Tex. 39, 237 S.W.2d 256 (1951). Moreover, the trustee of an express trust is given authority, absent limiting provisions in the instrument creating the trust, to exchange and invest property of the trust, article 7425b-25; a dependent executor of an estate has no such power absent an authorization from the probate court or an express grant of authority from testator. TEX. PROB. CODE ANN. § 234 (supp. 1974).

Even though the Texas Trust Act is not applicable, the executor of an estate is held to the same fiduciary standards in his administration of the estate as a trustee. Section 37 of

the Probate Code provides, in part, that the executor "shall recover possession of and hold such estate in trust to be disposed of in accordance with law." As trustee of the property of the estate, the executor is subject to the high fiduciary standards applicable to all trustees. In Slay v. Burnett Trust, 143 Tex. 621, 187 S.W.2d 377 (1945), this Court quoted with approval the following excerpt from Magruder v. Drury, 235 U.S. 106 (1914), at page 119:

> It is a well-settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity.

By purchasing its own certificates of deposit with funds of the Gutsch estate which it held in trust as executor, the Bank in effect borrowed the funds for its own use. Austin National Bank contends that it was expressly authorized to invest the estate's funds in its own certificates of deposit by the provisions of 12 U.S.C.A § 92a (supp. 1975), and TEX. REV. CIV. STAT. ANN. art. 342-604 (1973). 12 U.S.C.A. § 92a provides that the Comptroller of the Currency shall be authorized to grant to national banks the power to act as executor of estates to the same extent that state banks are permitted such power. The statute requires national banks to segregate all assets held in a fiduciary capacity, and provides that

> . . . funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Comptroller of the Currency.
>
> 12 U.S.C.A. § 92a(d).

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The Comptroller of the Currency has issued regulations pursuant to section 92a granting to national banks power to act as executor coextensive with the authority of state banks. 12 C.F.R. Chapter I, Part 9. Thus federal law allows a national bank to deposit trust funds with itself when such funds are "awaiting investment," provided that (1) it sets aside in its trust department approved securities equal in face value to the amount of the fund, and (2) local law authorizes such a deposit.

Article 342-604 of the Texas Banking Code provides:

> Unless the trust instrument provides otherwise, funds received in trust by a state bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business, unless it shall first set aside in the trust department United States government bonds or other securities eligible under the laws of this State for the investment of funds by guardians or trustees of a market value equivalent to the amount so used . . . .

"[F]unds received in trust" within the meaning of this statute includes funds received by a bank as executor. Under these state and federal statutes, a bank may temporarily deposit with itself funds of an estate "awaiting investment" provided it sets aside adequate security. It is undisputed that Austin National Bank complied with the security requirement by setting aside in its trust department qualified securities equal in value to the certificates of deposit. The question to be decided, therefore, is whether the funds used to purchase the certificates of deposit were "awaiting investment" within the meaning of Article 342-604 and the corresponding federal law.

The Comptroller of the Currency has issued the following regulation, at 12 C.F.R. § 9.10, pursuant to 12 U.S.C.A. § 92a:

> § 9.10. Funds Awaiting Investment or Distribution
>
> (a) Funds held in a fiduciary capacity by a national bank awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account.

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(b) Funds held in trust by a national bank, including managing agency accounts, awaiting investment or distribution may, unless prohibited by the instrument creating the trust or by local law, be deposited in the commercial or savings or other department of the bank: Provided, that it shall first set aside under control of the trust department as collateral security:

(1) Direct obligations of the United States, or other obligations fully guaranteed by the United States as to principal and interest; or

(2) Readily marketable securities of the classes in which state banks exercising fiduciary powers are authorized or permitted to invest trust funds under the laws of the state in which such national bank is located; or

(3) Other readily marketable securities that qualify as investment securities pursuant to the Investment Securities Regulation of the Comptroller of the Currency, 12 C.F.R., Chapter I, Part 1. The securities so deposited or securities substituted therefor as collateral shall at all times be at least equal in face value to the amount of trust funds so deposited, but such security shall not be required to the extent that the funds so deposited are insured by the Federal Deposit Insurance Corporation. The requirements of this section are met when qualifying assets of the bank are pledged to secure a deposit in compliance with local law, and no duplicate pledge shall be required in such case.

It is apparent from this regulation that the Comptroller has interpreted the term "awaiting investment" in § 92a to mean "awaiting investment or distribution." The Comptroller's broad interpretation of § 92a comports with the interpretation of Article 342-604 urged by the Bank in this case.

In American Legion Post No. 90 of Village of Mamaroneck v. First National Bank and Trust Co. of Mamaroneck, 113 F.2d 868 (2nd Cir. 1940), the Court construed the term "awaiting investment" in the statute from which § 92a was derived, 12 U.S.C.A. § 248(k). In that case some investors had placed proceeds from the sale of land with the bank pending their distribution to the investors. Because of litigation concerning the proper allocation of taxes arising from the sale,

the proceeds remained in the bank's trust department for several years, during which time the bank paid three percent interest on the funds. The bank had set aside securities to secure the trust fund as required by § 248(k) and the corresponding regulations. When the bank became insolvent the investors attempted to claim their lien on the securities so set aside, and the general creditors of the bank challenged the lien, contending that the funds were not "awaiting investment" within the meaning of § 248(k). The Court agreed with the investors, stating, at page 872:

> Perhaps more serious is the further claim that these were not funds held in trust "awaiting investment" and hence without the statute. We think, however, that this is too narrow a construction of the statute, and really defeats its intent. If trust funds held for investment are subject to the statute, but trust funds held for distribution are only general assets of the bank, then we find a serious difference in result following from a very slight, even formalistic, change in the relations of the parties. It would be no great stretch to term this a fund held "for investment," particularly since the desire of the subscribers for some increment on their funds was made so clear. . . .
>
> Moreover, a broader interpretation should be given to the statute. We think that the provisions for security include in general the fiduciary funds which the bank is required to keep segregated from its general assets.

We agree with the construction placed upon § 92a by the Court of Appeals for the Second Circuit and by the Comptroller, and we believe that the same interpretation should be placed upon article 342-604 of the Banking Code. The Gutsch estate's funds were held by the Bank in its fiduciary capacity as executor of the estate, and the Bank was required to keep the funds segregated from its general assets. The Bank held the funds temporarily, pending the outcome of litigation which would determine whether it would place them in a charitable trust or distribute them to the beneficiaries. We hold that these

were funds "awaiting investment" within the meaning of article 342-604 and 12 U.S.C.A. §92a, and that the Bank was thereby authorized to invest the funds in its own certificates of deposit pending final determination of their proper dispersal. This interpretation most fully effectuates the purpose of the statute to allow efficient temporary investment of funds held in trust by a bank pending their ultimate disposition, while providing maximum security for those funds.

The Humane Society next contends that, even if the Bank's purchase of its own certificates of deposit was not wrongful per se, the Bank should be liable for profits which it could have realized by investing the funds in certificates of other banks and savings and loan institutions. The Humane Society offered proof at trial that the higher interest rates offered by other banks would have yielded $3,775.66 more over the sixteen months during which the funds were invested.

Although article 342-604 and 12 U.S.C.A. § 92a authorize the Bank to use the trust funds in the conduct of its business provided it sets aside the proper security, these statutes do not relieve the Bank of its fiduciary duty to the estate. The Bank holds the estate funds in trust for the beneficiaries, and in its dealings with the fund the Bank must act in scrupulous good faith, casting aside completely its personal interest and opportunities for gain resulting from the fiduciary relationship. See Johnson v. Peckham, 132 Tex. 148, 120 S.W.2d 786 (1938); TEX. PROB. CODE ANN. § 230(a) (1956). Austin National Bank's conduct in carrying out the probate court's order to sell the estate's bank stock and re-invest the proceeds must be measured by these strict fiduciary standards.

The order of the probate court authorized the Bank to invest the estate's funds in:

> . . . certificates of deposit in banks and savings and loan institutions; day-in, day-out

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savings accounts; commercial paper in prime-rated corporations; U. S. Treasury bills, bonds or notes due within two years; and U. S. agency securities due within two years.

Mr. George K. Meriwether, senior vice-president and trust officer of the Bank, who was in charge of the administration of the Gutsch estate, testified that at the time the estate's bank stock was sold the interest rates for day-in, day-out savings accounts, U. S. Treasury bills, bonds and notes due within two years, and U. S. agency securities due within two years were less than interest rates offered by Austin National Bank on its certificates of deposit. He testified that he believed the interest rates for commercial paper in prime-rated corporations were lower than the Bank's rates also. This testimony was not challenged by the Humane Society. Another officer of the Bank testified that the interest rates paid on certificates of deposit purchased with estate funds were always at least equivalent to or more than the Bank's "published rates," the rates offered general customers of the Bank. This testimony is uncontradicted. Mr. Meriwether also testified that the Bank allowed him to cash in some certificates of the estate before their maturity dates and purchase new certificates at higher rates when it was advantageous to do so, and that other banks in the area would not have allowed him to do so.

The Humane Society offered evidence that other banks and savings and loan institutions in the Austin area were offering interest rates as much as one percent higher than rates offered by Austin National Bank on comparable certificates of deposit during the seventeen-month period that the estate's funds were invested in Austin National Bank's certificates. Based on this evidence, the Humane Society contends that by investing in these other institutions' securities the estate funds could have earned $3,775.66 more in interest during these seventeen months. While the Bank contests this figure, its officers admitted that other institutions were offering higher interest

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rates on certificates of deposit, and that the funds would have returned a better profit if invested in certificates of other institutions.

The rate of return, however, is not the only criterion for determining the propriety of the Bank's investment decision in this case. The safety of the trust fund is also a primary consideration of the fiduciary. Republic National Bank & Trust Co. v. Bruce, 130 Tex. 136, 105 S.W.2d 882 (Tex. Comm. App. 1937, opinion adopted). This is especially true of funds of an estate held by an executor, whose primary duty is preservation of the estate for distribution. Austin National Bank set aside in its trust department qualified securities equivalent in value to the certificates of deposit purchased with the estate's funds, as required by the regulations of the Comptroller. Mr. Meriwether testified that other banks and institutions were prohibited by law from providing security for their certificates of deposit issued to general customers over the $20,000.00 limit set by the Federal Deposit Insurance Corporation and state law. This testimony, which was not challenged or contradicted, indicates that the Bank could not have obtained one hundred percent security by investing the estate's funds in certificates of deposit of any other financial institution. The total interest earned on the Austin National Bank certificates of deposit during the sixteen-month period was $85,815.11, the interest rates varying from six to ten percent. Thus the extra interest of $3,775.66 to which the Humane Society contends it is entitled constitutes less than five percent of the total interest paid. The Bank's decision to forego this extra income and obtain instead the full security offered by its own certificates of deposit was not, we believe, in furtherance of its own self-interest to the detriment of the estate.

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The Bank was investing the estate's funds in short-term certificates of deposit in order to be in a position to make prompt distribution of the money upon final conclusion of the court proceedings in the will construction case. From the time of the first investment in the certificates of deposit to the time the funds were delivered to the Humane Society was slightly less than sixteen months. During all of this time the estate was in litigation. The bank officers testified that they intentionally made short-term investments so they could be ready to deliver the estate on short notice. The distribution promptly occurred as soon as the litigation ceased.

Under the circumstances of this case the Bank did not breach its fiduciary duty as executor by preferring its own certificates of deposit over those of other institutions. The portion of the offset seeking $3,775.66 in lost income was properly denied by the probate court.

The Humane Society also seeks offsets against the Bank's claims for $8,731.13, the cost of taking care of the house and land given to the City of Austin and the storage fee for furniture and other personal property given to Mrs. Gutsch's godchild. The Bank had the duty to take care of the estate's assets as a prudent man would take care of his own property. TEX. PROB. CODE ANN. § 230(a) (1956). This duty continued until the suit seeking a construction of the will was finally disposed of. These offsets were properly denied by the probate court.

Finally, the Humane Society challenges the Bank's claim for $8,100.00 in attorneys' fees and legal expenses for representation of the estate through the appeal of the will construction suit, on the ground that the representation was only for the benefit of the Bank and not the estate. We do not agree. There were serious questions concerning the

construction of the will. The Bank's duty as executor was to determine the testatrix's intent and distribute the estate in accordance therewith; the actions of the Bank were in good faith and in accord with its duty to the estate. There is no contention that the amount of the claim for attorneys' fees is not reasonable. The Bank's claim was properly allowed. Rowe v. Dyess, 213 S.W. 234 (Tex. Comm. App. 1919).

The judgment of the Court of Civil Appeals is affirmed.

Ross E. Doughty
Justice

Chief Justice Greenhill not sitting.

Opinion delivered December 10, 1975.

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APPENDIX B

STATUTES AND REGULATIONS INVOLVED

12 CFR Section 9.12 Self-Dealing.

(a) Unless lawfully authorized by the instrument creating the relationship, or by court order or by local law, funds held by a national bank as fiduciary shall not be invested in stock or obligations of, or property acquired from, the bank or its directors, officers or employees, or individuals with whom there exists such a connection, or organizations in which there exists such an interest, as might affect the exercise of the best judgment of the bank in acquiring the property, or in stock or obligations of, or property acquired from, affiliates of the bank or their directors, officers or employees.

12 CFR Section 9.10 Funds awaiting investment or distribution.

(a) Funds held in a fiduciary capacity by a national bank awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account.

(b) Funds held in trust by a national bank, including managing agency accounts, awaiting investment or distribution may, unless prohibited by the instrument creating the trust or by local law be deposited in the commercial or savings or other department of the bank, provided that it shall first set aside under control of the trust department as collateral security:

(1) Direct obligations of the United States, or other obligations fully guaranteed by the United States as to principal and interest; or

(2) Readily marketable securities of the classes in which state banks exercising fiduciary powers are authorized or permitted to invest trust funds under the laws of the state in which such national bank is located; or

(3) Other readily marketable securities that qualify as investment securities pursuant to the Investment Securities Regulation of the Comptroller of the Currency, 12 CFR, Chapter I, Part 1.

The securities so deposited or securities substituted therefor as collateral shall at all times be at least equal in face value to the amount of trust funds so deposited, but such security shall not be required to the extent that the funds so deposited are insured by the Federal Deposit Insurance Corporation. The requirements of this section are met when qualifying assets of the bank are pledged to secure a deposit in compliance with local law, and no duplicate pledge shall be required in such case.

12 USCA Section 92a. Trust Powers - Authority of the Comptroller of the Currency.

(a) The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

(b) Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.

(c) National banks exercising any or all of the powers enumerating

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in this section shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this section. The State banking authorities may have access to reports of examination made by the Comptroller of the Currency insofar as such reports relate to the trust department of such bank, but nothing in this section shall be construed as authorizing the State banking authorities to examine the books, records, and assets of such bank.

(d) No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Comptroller of the Currency.

(e) In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities to set apart in addition to their claim against the estate of the bank.

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APPENDIX C

NO. 33,700.

ESTATE OF MARY MAYFIELD	)	IN THE COUNTY COURT OF
	)	
GUESCH, DECEASED	)	TRAVIS COUNTY, TEXAS.

ORDER FOR SALE OF
COMMON STOCKS AND REINVESTMENT

On this 15th day of September, 1972, came on to be heard the application for sale of common stocks and reinvestment by the Austin National Bank, executor of this estate, joined by The Humane Society of Austin and Travis County, the principal beneficiary by trust or otherwise of the personal property of this estate, filed herein on September 11, 1972. Having considered such application and being of the opinion that it should be granted, it is therefore

ORDERED that the executor be and it is hereby authorized to sell at public auction or privately, for cash, the following common stocks owned by this estate:

(1) 969 shares of stock in The Austin National Bank, Austin, Texas, at not less than $57.00 per share.

(2) 4,444 shares of Merchants and Planters Bank of Sherman, Texas, stock at not less than $75.00 per share.

(3) ~~6,200~~ 6,116 shares of The First National Bank in Dallas stock at not less than $32.00 per share.

(4) 750 shares of Security Financial Services, Inc., Sheboygan, Wisconsin, stock at not less than $49.00 per share

It is further ORDERED that the executor be and it is hereby authorized to purchase with the proceeds of such sale, certificates of deposit in banks and savings and loan institutions; day-in, day-out savings accounts; commercial paper in prime-rated corporations; U. S. Treasury bills, bonds or notes due within two years; and

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U. S. agency securities due within two years.

Signed, rendered, and entered this 15th day of September, 1971.

/s/

J. E. WATSON
COUNTY JUDGE, TRAVIS COUNTY, TEXAS.

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